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No. 89-720

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

AVDEL CORPORATION,

Petitioner,

v.

RICARDO JALIL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is there a conflict in the Circuits concerning the preclusive effect of an arbitration award confirmed by a state court where the state court did not consider the merits of the claimant's Title VII claim?

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Respondent Ricardo Jalil respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Third Circuit's opinion in this case. That opinion is reported at 873 F.2d 701 (1989).

STATUTES INVOLVED

In addition to the statutory provisions cited by petitioner, the following statute is relevant to the question presented:

N.J.S.A. 2A:24-8. Vacation of [arbitration] award; rehearing

The court shall vacate the award in any of the following cases:

a. Where the award was procured by corruption, fraud or undue means;

b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;

c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;

d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

When an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

COUNTERSTATEMENT OF THE CASE

On October 30, 1989, respondent Ricardo Jalil was terminated as an employee of petitioner Avdel Corporation ("Avdel") because of "gross insubordination" stemming from Mr. Jalil's use of a "walkman" radio allegedly in violation of company rules. Mr. Jalil, who was president of the United Electrical Radio Machine Workers of America, Local 417 (the "Union"), claimed that he was terminated wrongfully and filed a grievance pursuant to the terms of a collective bargaining agreement between Avdel and the Union.

Mr. Jalil alleged in his grievance that he was discharged in retaliation for having filed a Charge of Discrimination against Avdel with the New Jersey Division of Civil Rights and the Equal Employment Opportunity Commission ("EEOC") on October 17, 1985, which was received by Avdel on October 28, 1985, only two days before he was terminated.¹ Mr. Jalil stated that he had "been retaliated against in violation of the Civil Rights Act of 1964, as amended for having filed a charge against the employer." (75a).

During arbitration proceedings which followed, Avdel contended that Mr. Jalil had violated a company safety rule and had been insubordinate. The Union, on behalf of Mr. Jalil, argued that Mr. Jalil "did not violate any safety rule concerning radios for none exist[ed] and that he was not insubordinate." (72a). In fact, the Union contended that Mr. Jalil was "fired for his active role as Union representative." (72a).

Following a hearing, the arbitrator concluded that Mr. Jalil had been insubordinate for failing to obey an order to remove the radio. Although observing that the Union had also argued that Mr. Jalil's "termination [was] tied to charges made by the grievant with the EEOC," the arbitrator passed over that contention and concluded that he was "not convinced that the

¹ Mr. Jalil also claimed in the October 17, 1985 Charge of Discrimination that he had been improperly suspended by Avdel in September 1985, that the reason for the suspension was his national origin, and that his repeated requests to review his personnel file had been denied.

employee was terminated because of his union activity." (73a). The arbitrator did not consider at all whether Mr. Jalil's firing may have been discriminatory notwithstanding his finding of insubordination.²

Mr. Jalil sought to vacate the arbitrator's award in the Superior Court of New Jersey on the grounds that the award was in violation of the arbitrator's statutory powers, and, alternatively, that the arbitration award was procured by undue means. (62a). Avdel cross-moved to confirm the award.

The New Jersey court expressly declined to review the merits of the arbitrator's decision, recognizing that, pursuant to N.J.S.A. 2A:24-8, it has "a very limited role" in reviewing arbitration awards. (63a). Accordingly, the New Jersey court observed:

We are not second judges of what the arbitrator did. To put it in simpler terms we are not second guessers of what the arbitrator did. We are not here to say that given the same set of facts, we would come to different conclusions or given the same testimony we would find different facts. We are certainly not here to say that even if we agree with the conclusions reached by the arbitrator that the penalty which — I mean which the arbitrator imposed is not something that a judge or some other judge would have done.

(62a-63a). The New Jersey court thus confirmed the award because it "found no evidence that the arbitrator's award was procured by undue means or that the powers of the arbitrator were exceeded." (62a).

Following the New Jersey court's confirmation of the arbitrator's award in favor of Avdel, Mr. Jalil proceeded *pro se* by filing a complaint in the United States District Court for the District of New Jersey. Mr. Jalil alleged that Avdel terminated his employment because of his national origin and in retaliation

² In its Petition, Avdel mischaracterizes the arbitrator's decision when claiming that "[t]he arbitrator specifically addressed and rejected Jalil's discrimination and retaliation claims." (Petition at 8).

for his filing of a discrimination charge with the EEOC, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* Mr. Jalil also sought to vacate the decision of the arbitrator and to reverse the New Jersey court's confirmation of the award. After the Honorable Dickinson R. Debevoise, U.S.D.J., granted Avdel's motion for summary judgment, *Jalil v. Avdel Corp.*, No. 86-4878 (D.N.J. Aug. 3, 1987), Mr. Jalil, again proceeding *pro se*, filed a second Title VII claim in the United States District Court. (43a). The Honorable Harold A. Ackerman, U.S.D.J., granted Avdel's motion for summary judgment in the second action as well. *Jalil v. Avdel Corp.*, No. 87-4457 (D.N.J. March 1, 1988). (34a).

Mr. Jalil appealed both decisions to the United States Court of Appeals for the Third Circuit, which consolidated them and appointed the undersigned counsel to represent Mr. Jalil. On appeal, Mr. Jalil argued that the evidence before Judge Debevoise established a *prima facie* case of retaliatory and national origin discrimination.

Avdel opposed the appeal principally on the ground that Judge Debevoise had correctly concluded that Mr. Jalil had failed to establish a *prima facie* claim because his insubordination made him unqualified to continue employment. Secondly, relying on this Court's opinion in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), Avdel argued that the arbitrator's award should be given great deference and that it supported a grant of summary judgment by the district court.

In an opinion filed on February 1, 1989, the Court of Appeals affirmed the summary judgment as to Mr. Jalil's national origin claim, but reversed the summary judgment as to the retaliatory discrimination claim because "the evidence created a factual issue regarding [Avdel's] motivation that properly belongs to the factfinder." (32a). As for Avdel's argument that the arbitrator's award, as confirmed by the New Jersey court, justified summary judgment, the Court wrote:

Although an arbitral determination may be accorded great weight if it gives full consideration to an

employee's Title VII rights, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 & n.21 (1974), it cannot, in itself, be dispositive of a Title VII claim because the Civil Rights Act of 1964 vests final responsibility for the enforcement of Title VII in the federal courts.

(32a-33a). On the facts before it, the Court of Appeals concluded that the arbitrator's award was "not due the great weight necessary to achieve summary judgment for [Avdel]." (33a).

On a motion for leave to file a petition for rehearing before the court *en banc*, Avdel argued that the Court of Appeals' opinion was contrary to its decision in *Rider v. Commonwealth of Pennsylvania*, 850 F.2d 982 (3d Cir.), *cert. denied*, U.S. , 109 S. Ct. 556 (1988), and the Ninth Circuit's opinion in *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), *cert. denied*, U.S. , 110 S.Ct. 69 (1989), where federal courts had given preclusive effect to state court decisions confirming arbitration awards after reviewing the Title VII claims in issue on their merits. The Court of Appeals subsequently granted the petition for a rehearing and vacated its earlier opinion. (21a). In an opinion filed on May 4, 1989, the Court distinguished *Rider* on the grounds that the New Jersey court had not given consideration to Mr. Jalil's Title VII rights and again reversed the summary judgment as to Mr. Jalil's retaliatory discrimination claim:

In Jalil's case, the arbitrator made passing reference to plaintiff's Title VII claims, although from our reading it appears to us that he did not adequately consider the retaliatory discharge claim or the question whether a firing may be discriminatory notwithstanding the employee's insubordination. In contrast to *Rider*, however, the state court here gave no consideration to plaintiff's Title VII rights, explicitly refusing to stand as "second guessers of what the arbitrator did." Thus, here, unlike *Rider*, the state court reviewing the arbitrator's decision did not address the same issues raised in Jalil's Title VII action.

Jalil v. Avdel Corp., 873 F.2d 701, 706 (3d Cir. 1989) (citations and footnotes omitted).

REASON WHY THE PETITION SHOULD BE DENIED

There Is No Conflict In The Circuits Concerning The Preclusive Effect Of An Arbitration Award Confirmed By A State Court Where The State Court Did Not Consider The Merits Of The Claimant's Title VII Claim.

Avdel contends that its petition should be granted because the Court of Appeal's decision conflicts with the decision of the Ninth Circuit in *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), *cert. denied*, U.S. , 110 S.Ct. 69 (1989). (Petition at 8). Avdel misapprehends *Caldeira*, however. There, the Title VII plaintiff, as in *Rider v. Commonwealth of Pennsylvania*, *supra*, had a "full and fair opportunity" to have his discrimination claim reviewed on the merits before a state court.

That court "was presented with more than the collective bargaining agreement and the award before rendering its confirmation order." 866 F.2d at 1180 n.3. The plaintiff "squarely attacked the merits of the arbitrator's decision." *Id.* Thus, "[t]he state court circuit, in confirming the arbitrator's award, necessarily determined that proper cause existed for Caldeira's discharge due to insubordination." *Id.* at 1179. _

Similarly, in *Rider*, which Avdel unsuccessfully sought to portray in the court below as conflicting with its decision in this case, the state court decided the issue of discrimination on the merits. On review, the Third Circuit observed:

[A]s we read the Commonwealth Court's opinion, its judgment was derived, in large part, from an independent analysis of the [discrimination] question.

Rider, *supra* , 850 F.2d at 992-93. The Court concluded that whatever else the Commonwealth Court may have considered in the instant case, it clearly considered

and disposed of the merits that gave rise to this dispute

Id. at 993.

Unlike the plaintiffs in *Caldeira* and *Rider*, Mr. Jalil had no such opportunity for judicial review of his discrimination claim on the merits, because the New Jersey court followed a narrow statutory scope of review in considering whether to vacate the arbitrator's award. As the Third Circuit concluded:

A review of the New Jersey court's opinion confirming the arbitrator's decision reveals that the issues there are not identical to the issues in Jalil's Title VII action in federal court Because the issues in the two actions differ, the state court's affirmance of the arbitrator's decision cannot have preclusive effect in the Title VII action before us.

It is this difference in issues that distinguishes this case from *Rider*

Jalil v. Avdel Corp., *supra*, 873 F.2d at 705.

Finally, it should be noted that the opinion of the Court of Appeals is consistent with *Bottini v. Sadore Management Corp.*, 764 F.2d 116 (2d Cir. 1985), which the Ninth Circuit recognized in *Caldeira* presented a materially different set of circumstances from those present in either *Caldeira* or *Rider*. *Caldeira*, *supra*, 866 F.2d at 1179-80. In *Bottini*, like *Jalil*, the state court's review of the arbitration award was narrowly limited, and the state court lacked the power to address the merits of the plaintiff's Title VII claim. *Bottini*, *supra*, 764 F.2d at 120-21.

In sum, Avdel seeks to create a conflict where none exists among the circuits. The Second, Third, and Ninth Circuits are in agreement that where a state court has not considered the merits of a discrimination claim in reviewing an arbitrator's award, the plaintiff has the right to have his Title VII claim heard by a federal court, and preclusive effect should not be given to the state court's judgment.

CONCLUSION

For this reason, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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